COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Rulemaking by the Department of Telecommunications)

and Energy, pursuant to G.L. c. 166, ə 25A, and)

220 C.M.R. əə 2.00 *et seq*., to amend the regulations)

at 220 C.M.R. əə 45.00 *et seq*. to Establish Complaint and) D.T.E. 98-36

Enforcement Procedures to Ensure that)

Telecommunications Carriers and Cable System)

Operators have Non-Discriminatory Access to Utility)

Poles, Ducts, Conduits, and Rights-of-Way)

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FURTHER COMMENTS OF BELL ATLANTIC-MASSACHUSETTS

ON PROPOSED AMENDMENTS TO 220 C.M.R. əə 45.00 *et seq*

Bell AtlanticBMassachusetts (ABA-MA≅) files these further comments on the Department=s proposed amendments to 220 C.M.R. əə 45.00 *et seq.* These comments address the Department request in its Notice of August 27, 1999,~~XXX~~ for comments by the parties on the issue of whether the final version of these rules should provide competitive telecommunications and cable companies with nondiscriminatory access to poles, conduits, and rights-of-way inside and on commercial and residential buildings. There is no reason for the Department to promulgate a rule to provide for access because M.G.L. c. 166, ə 25A and the regulations the Department has proposed in this docket already require telecommunications and cable companies to provide access to these facilities *regardless of their location*. The Department should, however, take steps to

prevent utilities, including cable system operators, from entering into exclusive contracts with property owners relating to the provision of facilities in or on commercial and residential buildings.

DISCUSSION

I. M.G.L. c. 166, ə 25A And The Department=s Proposed Rules Already Require Telecommunications Carriers and Cable System Operators to Permit Nondiscriminatory Access to Poles, Ducts, Conduits, or Rights-of-Way, Regardless of The Location of These Facilities

Pursuant to ə 224 of the Telecommunications Act of 1996 (AAct≅), Autilities,≅ including local exchange carriers (ALECs≅), must provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit or right-of-way that they *own or control*. *See* 47 U.S.C. ə 224. Unlike the definition of Autility≅ in the federal statute, the Department=s proposed rule defines Autility≅ - consistent with M.G.L. c. 166, ə 25A B to include not only local exchange carriers, but also cable system operators as well. *See Department=s Proposed Rule 45.02.* Therefore, unlike the federal rule, the proposed Massachusetts rule will require not only telecommunications carriers, but cable system operators to provide nondiscriminatory access to poles, ducts, conduits or rights of way that they own or control, or over which they share ownership or control. *Id.* The inclusion of cable systems operators in this definition is important because, while BA-MA currently provides, and will continue to provide access to these facilities to cable systems operators, telecommunications carriers, and other utilities in Massachusetts (where it is operationally and technically feasible to do so), the Department=s proposed *Rule 45.02* eliminates any ambiguity as to the obligation of cable systems operators to provide comparable access to their facilities. Therefore, the Department=s proposed *Rule 45.02* will advance the Department=s policy objective of achieving nondiscriminatory access to such facilities for all utilities, including cable companies.

Furthermore, the Department=s proposed *Rule 45.03 (1)* expressly provides that such Autilities shall provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.≅ The utility=s obligation is not limited by the location of these facilities. Thus, there is no need for the Department to issue additional rules specifically addressing poles, conduits, or rights of way inside and on commercial and residential buildings.

II. Restrictions Imposed By Private Property Owners Who Are Not Utilities Should Not Be Addressed In This Docket

In the case of privately owned commercial and multiple dwelling units, a utility=s ability to permit such access is necessarily limited by the scope of its rights in the property. For

example, where the poles, ducts, conduits or rights-of-way are owned by a premises owner that is not a utility, BA-MA could not legally provide access to others without the owner=s consent. Any attempt by the Department to create a right of physical access by multiple providers to install their own facilities on private property would raise serious and possibly insurmountable taking problems. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 432-38 (1982) (holding that any Apermanent physical occupation,≅ however small, effectively destroys an owner=s rights to possess, use, and dispose of the property in question, the fact of the occupation is itself sufficient to show that there has been a Ataking≅ for which compensation is due); *Bell Atlantic v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994). The FCC has commenced a rulemaking, in which it has sought and received comments on this issue from carriers, building owners and managers, and many other interested parties across the country. The FCC=s ultimate conclusion on these issues, informed by this broad inquiry, will be extremely beneficial to the Department, in determining what, if anything should, or can be done to address access issues in situations where landlords refuse to grant access. Therefore, the Department should wait until the FCC has completed its proceedings addressing these issues prior to taking any action on this issue.

III. The Department Should Adopt Rules To Prevent Utilities From Entering Into Exclusive Contracts With Property Owners

The Department should, however, take action to prevent all service providers subject to M.G.L. c. 166, ə 25A from entering into exclusive contracts with property owners relating to the provision of access to poles, conduits and rights-of-way inside and on commercial and residential buildings. Specifically, the Department should adopt a rebuttable presumption that exclusive contracts between utilities (including cable systems operators) and building owners and managers, that exclude access to other utilities are anticompetitive and null and void. A company could rebut this presumption by, for example, demonstrating that failure to allow an exclusive contract for a period of time would deprive tenants of needed telecommunications services or showing that said term was a condition imposed on the utility by the property owner. However, even where the presumption is successfully rebutted, any period of exclusivity should strictly limited.

The Department=s adoption of such a presumption would be consistent with its stated objective of assuring nondiscriminatory access to all utilities (including cable systems operators) and consistent with the FCC=s recognition that such access is critical to the successful development of competition in the local market. Accordingly BA-MA proposes that the Department add the following additional sentence to *Rule 45.03 (1):*

> Any exclusive occupancy arrangement between a utility and a property owner for the placement of the utility=s facilities on private property shall be presumptively invalid and the Department may grant such relief to an aggrieved party seeking access to those facilities as the Department

may determine after notice to the utility and an opportunity to be heard.

Respectfully submitted,

New England Telephone and Telegraph Company,

d/b/a Bell Atlantic-Massachusetts

By its attorneys,

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